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1. cc Mr Walford

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2. Return to me please

23 February 1999

Dear Dan

LEGISLATION AT WESTMINSTER ABOUT DEVOLVED MATTERS

1. We spoke briefly last week about our thinking about how flesh should be put on the bones of the announcement last year that the Government expects a convention to operate that Westminster will not normally legislate about devolved matters without the consent of the Scottish Parliament.
2. Some decisions are for the Scottish Ministers and Parliament, but others are for the UK Government. Ian Walford and I think that it would be useful if the UK Government's decisions could be made soon so that they can be reflected in planning for the transition period and guidance for next session's legislation. In particular, we need to establish the approach which should be taken in seeking the Parliament's consent for the Food Standards Agency bill, which may be introduced in during the transition.
3. I attach a draft paper which I have circulated within the Scottish Office. Our plan is to put the questions in it to our Secretary of State and then circulate the paper on the DP net either at Ministerial or official level seeking clearance for the proposals and for a low-key announcement (presumably in a Parliamentary answer by the Secretary of State for Scotland) after 6 May about how the UK Government envisages the convention working.
4. I should be very grateful for your comments (**by Monday next week if at all possible**) on the paper and on the approach outlined in the previous paragraph. In particular, is there any issues here which we should seek to feed into the Procedure Committee's investigation of the procedural consequences of devolution?
5. As you suggested, I have spoken to the Welsh Office and am copying this letter to Steven Pomeroy. Steven's view, if I understand it correctly, is that the convention will not be particularly relevant to the Welsh Assembly because there are no devolved matters in Wales,

merely transferred functions. Instead there is have a statutory requirement that the Secretary of State should consult the Assembly about proposals for legislation.

6. The Northern Irish situation is more similar to ours, but I want to hold off from involving them until we have a more fully worked up set of proposals.

Tom

DR

DAVID ROGERS

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LEGISLATION AT WESTMINSTER ABOUT DEVOLVED MATTERS

Introduction

Lord Sewel announced to the Lords on 21 July 1998¹ that the Government “would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament”. In her memorandum to the House of Commons Procedure Committee’s inquiry into the procedural consequences of devolution in November, the President of the Council indicated that the Government expect the convention to apply also to Wales and Northern Ireland and to be adopted for all public bills, and that it is likely to oppose any private Member’s bill which seeks to alter the law on devolved subjects unless it is clear that the proposal has the support of the devolved body concerned.

It will be for the administrations in Whitehall and Edinburgh to work together to operate this convention. As it will fall to the Scottish Ministers to seek the consent of the Scottish Parliament, some decisions about the operation of the convention will be for them. However, others require policy decisions by the UK Government.

Similar issues arise where UK Ministers will have powers to make subordinate legislation about devolved matters.

Legislation introduced at Westminster after 6 May 1999

What precisely should the Scottish Parliament be asked to consent to? An approach which would maximise Holyrood’s input would be to seek its consent both to the introduction of a bill and to its final form, and for there to be scheduled opportunities for it to debate amendments which have been made to it or even to propose amendments. But we think that such an approach would be impracticable. It would certainly delay proceedings at Westminster and could be a source of tension between the 2 legislatures. And it might be seen as inappropriate for the Scottish Parliament to scrutinise a bill formally before it is tabled at Westminster.

The form of the proposal put to Holyrood would be a matter for the Scottish Ministers. We propose, however, that what we should aim to see sought is consent to the principle of Westminster legislating on a particular matter within the Scottish Parliament’s legislative competence, and for the principle of the proposed legislation. This should be obtained before a bill is introduced at Westminster. Thereafter Westminster should be left to get on with legislating. The Scottish Parliament will, after all, have the competence to amend the legislation once it is on the statute book. However, it would be incumbent on the UK Government to liaise closely with the Scottish Ministers during the passage of the bill. And if the Scottish Ministers or Parliament express unhappiness with amendments proposed or made to the bill they could of course make that clear for Westminster to take into account.

¹ HL Debates, Vol 592, col 791, 21 July 1998

Officials of the Scottish Administration would be able to brief UK Ministers leading on Bills containing Scottish provisions, but on the understanding that they were part of a bill team which would be led by an official from the UK Department and that the UK Department would have the final say on what briefing went to the Minister.

Private legislation. We expect private legislation which covers reserved as well as devolved matters to continue to be made at Westminster. It would seem appropriate for the UK Minister with policy responsibility to consult the Scottish Ministers and for them to seek the consent of the Scottish Parliament.

When should the convention begin to operate? Although Holyrood will not assume its powers until 1 July the UK Government is likely to find it difficult to defend any decision after the Scottish election on 6 May to introduce bills at Westminster covering devolved matters unless it is clear that the proposal has the support of the Scottish Parliament. We consider, therefore, that the Government ought to regard the convention as applying from 6 May onward. There is already a public commitment [*Dr Wildgoose, when and by whom?*] that such consent would be sought for the bill to establish the Food Standards Agency.

Accountability of UK Ministers to Westminster for devolved matters. In its evidence to the Procedure Committee, the Government sought to establish the principle that UK Ministers will not generally in future answer Parliamentary questions about matters which are the responsibility of the Scottish Ministers. An exception to this general rule will have to be made for a UK Minister piloting a Bill through Parliament which covers devolved matters. The lead UK Minister on a Bill which contains devolved Scottish provisions would need to make it clear in a statement to Parliament when the Bill is introduced (or at Second Reading) that the provisions are being introduced with the consent of the Scottish Parliament, that he would be consulting Scottish Ministers during the passage of the legislation, and that while he would be answerable to Parliament for the passage of the devolved legislation he would not be generally accountable for the relevant devolved matter.

Bills introduced before the establishment of the Scottish Parliament which are still before Westminster on D-Day

A number of Bills containing devolved Scottish provisions are to be considered at Westminster this session. Most are expected to have received Royal Assent before 1 July. But it is possible that some may still be before Westminster on D-Day. The incoming Scottish Ministers will probably wish to make a statement before then to the Scottish Parliament explaining the position, stressing that the Parliament would be free to amend that legislation in the future if it wished to do so. There would be little point at that stage in formally seeking the Parliament's consent for such legislation given that it should by then have virtually completed its passage. However, should the Scottish Parliament or the Scottish Ministers raise concerns at that stage, the UK Government would no doubt wish to take them into account.

Secondary legislation

Under the Scotland Act, UK Ministers will have certain powers to make subordinate legislation about matters within the competence of the Scottish Parliament, as follows:

under Section 57 it will continue to be possible for a Minister of the Crown to exercise functions, such as to make regulations under Section 2(2) of the European Communities Act 1972, for the purpose of implementing an EC obligation as respects a devolved matter in or as regards Scotland. This provision was included in recognition of the possibility that there may be circumstances where it is convenient and sensible for EC obligations to be implemented through a single set of regulations having effect across the whole of the UK, rather than having separate regulations for Scotland. This will be a matter for agreement between the Scottish Ministers and the UK Government. It also enables a Minister of the Crown to rectify a breach of Community law which may have been committed by the Scottish Ministers;

in connection with private legislation the Secretary of State will retain the power to make provisional orders under the Private Legislation Procedure (Scotland) Act 1936 which partly cover devolved matters; and

under Sections 56 and 108 it is possible for a Minister of the Crown to be given further powers to make subordinate legislation about devolved matters. This may be done, for example, where it is agreed that it should be possible for regulations to be made on a UK-wide basis.

A similar range of issues arise for such secondary legislation as for Westminster bills. Where the instrument concerned is subject to affirmative procedure at Westminster it would seem appropriate for the UK Government to indicate to Parliament whether or not the Scottish Parliament's consent has been given. Again, it would be for the Scottish Ministers to seek such consent. Where an instrument is subject to negative procedure at Westminster, then it would seem inappropriate to seek the Scottish Parliament's prior consent. It would be for the Scottish Ministers to inform the Scottish Parliament that they have agreed to such an order being made.

Executive Secretariat
The Scottish Office
February 1999

Mr Grice

Copy to: PS/AEFD
PS/ES
Mr Cameron
Mrs Munro
Mr Walford
Mr Ewing
Mr Lindsay
Mrs Macdonald
Mrs McAllan

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FOOD STANDARDS BILL: DEBATE IN SCOTTISH PARLIAMENT

1. As I explained in our recent telephone conversation, the FS Bill may be introduced at Westminster this Session – if Parliamentary time becomes available. The Prime Minister has indicated that he wants it ready for introduction as short notice – which suggests introduction is likely.
2. Currently the Bill is out to consultation, with the consultation period ending on 24 March. Current plans are to have the Bill ready for Second Reading by 7 June (ie a planned date only). Pre-legislative scrutiny is being carried out by a special Ad Hoc Select Committee which aims to report by mid-April. Some loose ends remain to be tied up – some involving devolution – but they should be within the above timescales.
3. The odd feature of the Bill is that it sets up a UK Food Standards Agency and thereby covers, in primary legislation for introduction at Westminster, a matter which is devolved ie food safety. I should indicate that the Secretary of State endorsed proceeding on this basis (- at a meeting on 9 December) on grounds that the approach would have to be agreed by the Scottish Parliament. He has now written to opposition party leaders on the issue, the main lines of argument being that a Westminster Bill is the quickest way to ensure the setting up of the FSA and that it makes sense from a practical standpoint, for policy in this area to be close co-ordinated on a UK basis (eg single UK source of scientific advice etc). Hence, any opposition to this approach would inevitably lead to delay in the setting up of separate Agency arrangements for Scotland – and it would also be sub-optimal in policy terms.
4. This leaves us now with the need to clear the approach through the Scottish Parliament – both acceptance of the policy of a UK Agency and of legislating at Westminster in this devolved area. Our aim, given the above background and timing, is for this to be achieved by end May 1999. I would therefore be grateful if you could schedule a debate in the Parliament within this time frame ie before 31 May.
5. Finally, I should note that I have alerted Mr Walford to the above and he plans to include a reference to these arrangements in the transition paper he is currently drafting.

JR Wildgoose

JR WILDGOOSE
22 February 1999

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From: J R Wildgoose
AEFD Division A
22 February 1999

PS/Mr Galbraith

Copy to: PS/Secretary of State
PS/Lord Sewel
PS/Perm Sec
PS/AEFD
PS/DoH
DCMO
Mr Cameron
Mrs Munro
Mr Walford
Mr Symington
Mrs Macdonald
Mr Whitton
Mr Elder

1. Mr Rogers
2. Mr Herbert
3. 2/2/99

FOOD STANDARDS AGENCY: ANIMAL FEEDINGSTUFFS

Purpose

1. To seek the Minister's approval to amend Section 28 of the current draft of the Food Standards Bill to extend to Scottish Ministers the order making powers in the section – relating to regulation of animals feedingstuffs, their composition, production and treatment. Currently the version of the section, which has gone for consultation, only covers England and Wales.

Timing

2. Urgent. Subject to Ministerial agreement we will need to write to MAFF at official level to notify of the change and then to seek re-drafting of the section through Parliamentary Counsel.

Background

3. The draft of the FS Bill which has issued for consultation needs to be amended to account for certain points of detail. Most of the amendments are of a technical nature; some follow from the Scotland Act. Two, however, are more significant – first extending Scottish Ministers' powers to act on animal feedingstuffs to bring these in line with the powers they currently have (and which will transfer at devolution) in the Food Safety Act 1990 and second, powers to vary the FSA levy in Scotland. This minute concerns the former; the latter issue will be the subject of separate advice. (A meeting of MISC02 (officials) is scheduled for Friday 26 February to discuss the levy issue; I understand that a MISC1 meeting is also being arranged for week commencing 1 March).

4. The intention behind the order making powers on animal feedingstuffs in Section 28 of the draft Bill (copy attached – top copy only) is to "modernise" feeding stuffs control by relating it to the better mechanisms available under the Food Safety Act 1990 rather than Part IV of the Agriculture Act 1970 which currently provides for regulation making powers on animal feedingstuffs. There is concern that the 1970 Act powers (which will transfer to Scottish Ministers under devolution) may not be extensive enough to deal with the full range of issues on feedingstuffs that might arise in a food safety context. This is likely to be of significance in the future given the interest in GM feedingstuffs. And of course BSE underlines the significance of powers to control feedingstuffs on food safety grounds. However, the current draft of the section empowers Ministers in England and Wales only to

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make an order replacing Part IV with parallel provisions to those in the draft Food Standards Bill covering the Agency's functions.

5. The reasoning behind Parliamentary Counsel's decision to restrict this section to England and Wales only is that, as control of feeding stuffs is a devolved matter, it will be for the Scottish Parliament to decide whether to pass primary legislation in this area to give Scottish Ministers new powers, and is therefore outwith the scope of the FS Bill. In other words, there would be a breach of the constitutional convention that Westminster does not pass legislation extending to Scotland in a devolved area, without first seeking the agreement of the Scottish Parliament.

Consideration

6. The position on the constitutional convention is formally correct; a Westminster Bill should not be legislating in this devolved area without the agreement of the Parliament. But the whole FS Bill is essentially in the same position – a Bill which might be introduced at Westminster this session, if Parliamentary time becomes available, in an area which is devolved. And further, we plan anyway to consult the Parliament on the whole Bill – probably towards the end of May. Hence we can at the same time invite the Scottish Parliament's views on extending the order making powers to Scottish Ministers in the Bill.

7. Apart from these formal and legal issues, it makes sense in policy terms to extend the powers to Scotland. As indicated, the Agriculture Act 1970 powers may have gaps on feedingstuffs issues in relation to food safety – an undesirable position particularly given the high profile animal feed has had in the food safety content in the recent past. Delaying acquisition of these powers until a suitable primary legislative vehicle can be found in the Scottish Parliament also is undesirable against this background.

8. My advice therefore is that we should ask for the Bill to be amended so that the powers in Section 28 of the Bill extend to Scottish Ministers – and that this point be specifically drawn to the attention of the Scottish Parliament when the Bill is debated.

Recommendation

9. Ministers are recommended to agree to extension of the powers in Section 28 of the draft FS Bill to be exercisable by Scottish Ministers. Subject to that agreement I will write to MAFF officials with a request that redrafting be put in hand with Parliamentary Counsel.

J R Wildgoose

J R WILDGOOSE
22 February 1999

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